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PROOF OF SIGNATURES BY MARK.—Proof of a signature by mark is held, in *Wienecke v. Arbin* (Md). 44 L. R. A. 142, to be insufficiently made nearly twenty-five years afterward by testimony of an attesting witness that he certainly saw the signature made or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing—especially when there is no proof that the maker of the instrument made or authorized its delivery, or that it was read or explained to the maker, who could not read.

With this case is a review of the decisions as to proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction.

ILLEGAL ASSESSMENT—PAYMENT UNDER PROTEST.—Plaintiff being threatened with a levy of an execution against his real estate, issued upon an illegal assessment for municipal improvements, paid the amount under protest. There was at the time pending litigation, instituted by other parties similarly situated, for the purpose of enjoining such assessments, of which proceedings plaintiff had full notice, and to which he might easily have made himself a party. *Held*, that the payment, though under protest, was, under the circumstances, voluntary, and could not be recovered back. *Hoke v. City of Atlanta* (Ga.), 33 S. E. 412.

The soundness of this decision, on the ground upon which it is placed, viz., that the levy might easily have been enjoined, is doubtful. The fact that the courts are open to the tax-payer, to enjoin a threatened levy for an illegal tax, is no good reason why a payment made under such duress is not compulsory. Under such a rule, it would be difficult to imagine a compulsory payment made in response to a threatened levy, since the courts are always open for the protection of the citizen against official oppression. Certainly payment of an illegal claim in order to avoid arrest of one's person, is not rendered voluntary because he might have been immediately released by *habeas corpus*.

The decision may be sustained, however, on the ground that the principles applicable to duress of the person and of personal chattels do not, according to many authorities, apply to real estate, since if the levy be made on an illegal assessment, no title passes to the purchaser, and the real estate is not liable to disappear or perish, as in the case of chattels.

Whether or not there is sufficient duress to render the payment compulsory in such case, probably depends upon the question whether the sale would be absolutely void or merely avoidable by judicial proceedings. See *Rogers v. Greenbush*, 58 Me. 390 (4 Am. Rep. 292); *Forrest v. Mayor of New York*, 13 Abb. Pr. 350; *Stover v. Mitchell*, 45 Ill. 213; *Detroit v. Martin*, 34 Mich. 170 (22 Am. Rep. 512); note to *Mayor of Baltimore v. Lefferman* (Md.), 45 Am. Dec. 145, 160. Compare *Mayor of Richmond v. Judah*, 5 Leigh, 305.

WHEN SUIT CONSIDERED AS COMMENCED.—In *United States Blowpipe Co. v. Spencer* (W. Va.), 33 S. E. 342, it is held that the pendency of a suit in chancery dates from the issuing of the process, and not from the date of its service. In *Newman v. Chapman*, 2 Rand. 93, 102, it is said that while at law the writ is pending from the first moment of the day on which it bears *teste*, in chancery the rule "was relaxed and the suit was not regarded as pending until service of the subpoena." As said by the West Virginia court, "this ruling was based on the English practice, from the fact that never till bill filed did [the] writ issue; . . . but now

our Code says that 'process to commence a suit shall be a writ,' applying to both chancery and actions at law." The same language quoted by the court, is used in the Virginia statute. Virginia Code, sec. 3223.

On a question whether an action on a policy of insurance was barred by the limitation therein prescribed, it was held in *Va. Fire & Marine Ins. Co. v. Vaughan*, 88 Va. 832, 835, that the action was commenced on the day of the issuance of the writ. In *Noell v. Noell*, 93 Va. 433, 438 (in which the action was at law), Judge Cardwell quotes with approval from the opinion in *Burdock v. Green*, 18 Johns. 14, as follows: "The issuing of the writ is the commencement of the suit, in all cases where time is material, so as to save the statute of limitations." Such seems to be the rule generally prevailing in the American courts, so far as the parties to the suit are concerned, without distinction between proceedings at law and those in chancery: *Ross v. Luther*, 4 Cow. (N. Y.) 158, reported with an excellent note in 15 Am. Dec. 341. In this note the editor says: "The rule in chancery under the ancient practice was that a suit was deemed commenced as between the parties and their privies from the time of the issuance of the *subpœna* and its service, or a *bona fide* attempt to serve it; but the suit was not deemed pending so as to constitute notice to strangers until the *subpœna* was actually served."

In a monographic note to *Newman v. Chapman* (2 Rand. 93) in 14 A. Dec. 766, 776, the doctrine is said to be that so far as concerns *pendente lite* purchasers, without actual notice, a suit in chancery is not deemed pending until the service of process.

The modern rule would therefore seem to be, that as between the parties to the proceeding, whether at law or in chancery, the issuing of the writ is the commencement of the proceeding. But as to strangers—*e. g.*, *pendente lite* purchasers—without actual notice, the pendency of the proceeding dates from the service of the writ.

PLEADING—ADMINISTRATORS—*NE UNQUES EXECUTOR*.—Plaintiff as administrator of his intestate brought his action in *assumpsit* against the defendant, who pleaded *non assumpsit*. No proof was offered by plaintiff of his qualification as administrator. *Held*, that by pleading to the merits, defendant admitted the character in which the plaintiff sued—and that if defendant proposes to require proof of the qualification, he must do so by a special plea of *ne unques executor* (or *administrator*)—*McDonald v. Coles* (W. Va.), 32 S. E. 1033.

On this point the court said: "The defence makes the point that, under the plea of *non assumpsit*, it rested on the plaintiff to prove that he had been legally appointed administrator. This position cannot be sustained. There is a plea distinctively called, in the books on common-law pleading, a plea of '*ne unques executor*' (or '*administrator*'),—'never executor.' It must be used where it is intended to deny the right of the person to sue as executor or administrator, else his capacity to sue as such is admitted. 1 Chit. Pl. 517; 2 Lomax, Ex'rs, 380. The cases of *Brown v. Nourse*, 55 Me. 230; *Langdon v. Potter*, 11 Mass. 313; *Champlin v. Tilley*, 3 Day, 303; and *Collins v. Ayers*, 13 Ill. 358, show, on common-law authority, that, where an executor or administrator sues, there must be the plea of *ne unques*, else no proof of appointment is required. Generally, where one sues in a representative capacity, it need not be proven, unless there is a plea denying it. *Chicago Legal News Co. v. Browne*, 103 Ill. 317. Where there is a plea of general